STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	)	
On Its Own Motion	)	
	)	Docket No. 00-0596
Revision of 83 Ill. Adm. Code 730	)	

REPLY BRIEF OF
VERIZON NORTH INC. AND VERIZON SOUTH INC.

Dated: March 14, 2002

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Verizon North Inc. (f/k/a GTE North Incorporated) and Verizon South Inc. (f/k/a GTE South Incorporated) (collectively referred to as "Verizon"), through its attorneys, hereby submit this Reply Brief for this proceeding to the Illinois Commerce Commission ("Commission"). This Brief is filed in accordance with the procedural schedule established by the Administrative Law Judge.

I.
Executive Summary

The threshold issue before the Commission in this proceeding is whether the record supports the myriad of unnecessary and burdensome changes to 83 Ill.Adm. Code Part 730 – Standards of Service ("Part 730), as proposed by a few consumer and governmental intervenors, as well as certain proposals made by the Commission Staff. The answer to this question is no. Verizon has provided quality basic local exchange service for years. (Boswell Dir., Verizon Ex. 1.0, pp. 9-10; Boswell Reb., Verizon Ex. 2.0, p. 4). The record overwhelmingly demonstrates that under the existing Part 730 rules Verizon and almost every other local exchange carrier ("LEC") in the State continue to provide quality basic local exchange service under the existing Part 730 rule. (*Id*.). Indeed, other than certain claims about Ameritech-Illinois there is not even a scintilla of evidence claiming, let alone demonstrating, that customers are concerned about the existing levels of service being provided. Simply put, there is absolutely

no evidentiary basis to support the plethora of proposed changes to Part 730 that would negatively impact every LEC in the State.

Examination of the initial briefs filed in this proceeding highlights the fact that there is no evidentiary basis to support the proposals of the few consumer and governmental parties. Instead, the brief of the City of Chicago ("the City") and the brief of the Citizens Utility Board/Illinois Attorney General ("CUB/AG") rely solely on "policy" arguments and suppositions, not facts, to support their flawed claims. (*See e.g.*, TerKeurst Tr., p. 282). What the record unequivocally demonstrates is that neither the City nor CUB/AG presented any testimony complaining of the service quality of Verizon or any other LEC besides Ameritech-Illinois. (Riolo, Tr., pp. 380-82, 386; TerKeurst Tr., pp. 276-77). Equally important is the fact neither the City nor CUB/AG conducted any cost/benefit analysis concerning their proposals. (Riolo Tr., p. 383; TerKeurst Tr., p. 282). However, both the City and the CUB/AG witness acknowledged that their proposals would result in additional costs to LECs and their customers. (*Id.*). In sum, the City and CUB/AG ask the Commission to engage in regulatory trial and error by imposing more onerous standards and reporting requirements on LECs that are already satisfying their customers' demands for quality basic local exchange service. This is not sound regulatory policy, and the evidentiary record does not support their proposals.

Staff also proposes certain modifications to the existing Part 730 rule that are inappropriate and not supported by the record. Like the City and CUB/AG, Staff presented no evidence that Verizon, or the vast majority of LECs in this State for that matter, are providing sub-standard basic local exchange service. In reality, Verizon and these other LECs are providing quality basic local exchange service. Given this undisputed fact, the Commission

should be reluctant to impose an array of new regulatory burdens and costs on LECs and their customers to address a problem that does not exist.

The crux of this proceeding relates to concerns about Ameritech-Illinois. As the Commission recalls, this proceeding was initiated only 9 days after the current Part 730 rule was adopted on September 1, 2000. (Initiating Order, p. 1). The Ameritech-Illinois centric nature of the City and CUB/AG evidentiary presentations also reflects this fact. (*See* Riolo Dir., City Ex. 1.0, pp. 11-17, 34-37; TerKeurst Dir., CUB/AG Ex. 1.0, pp. 3-5, 14-15). This proceeding, however, is not an investigation of Ameritech-Illinois. Rather, the Commission specifically sought to examine rules of general applicability found in Part 730. The City and CUB/AG have a number of procedural options available to address their respective claims concerning Ameritech-Illinois' provision of basic local exchange service. Those procedural options should not involve this rulemaking, which impacts every LEC in the State.

In sum, Verizon supports a number of Staff's proposed modifications that serve to clarify Part 730 or incorporate recent legislative amendments, consistent with the Initiating Order in this proceeding. (Initiating Order, p. 2). These particular modifications are set forth in Verizon's Initial Brief. Beyond these limited modifications, there is no evidentiary basis to support the unnecessary and costly proposals offered by the City and CUB/AG, and certain Staff proposals. The unrebutted evidence shows that Verizon and every other non-Ameritech LEC are providing quality basic local exchange service. There is no basis to penalize these carriers for doing so.

II.
Argument

A. The City's Proposed Amendments To Part 730 Are Unreasonable, Unworkable, And Unsupported, And Should Not Be Included In A Rule Of General Applicability

The Public Utilities Act ("Act") authorizes the Commission, not the City, to regulate telecommunications carriers in this State. 220 ILCS 5/1-101 *et seq*. Apparently, however, and in contrast to the Act, the City wishes to share in regulating telecommunications carriers. (City Init. Br., p. 5)("the resources of the Commission, local governments and the general public can be coordinated to ensure that carriers are effectively engaged in the planning, provisioning and maintenance of the telecommunications network necessary to assure reliability and service quality."). Notwithstanding the General Assembly's specific delegation of authority to the Commission, the City seeks to impose a host of reporting requirements, other regulatory burdens, and their resulting costs on local exchange carriers ("LECs") throughout the State, simply to assuage its own ongoing issues with Ameritech-Illinois. (*See* generally, City Init Br.). Despite its claims to the contrary, the City presents no compelling basis to adopt any of its proposed modifications to the existing Part 730 rule.

The City's position is premised solely on the testimony of a witness who conducted no examination of the state of basic local exchange service quality provided by LECs other than Ameritech-Illinois. (Riolo Tr., pp. 380-82, 386). City witness Riolo had absolutely no knowledge whether Verizon or any other non-Ameritech-Illinois LEC was meeting the existing Part 730 standards. (*Id*.). Mr. Riolo had no knowledge of whether Verizon or any other non Ameritech-Illinois LEC had been meeting prior Part 730 standards (in place prior to September 1, 2000). (*Id*. at 381). Further, Mr. Riolo had no knowledge about whether Verizon customers had filed any complaints with the Commission concerning the provision of basic local

exchange service. (*Id*.). Indeed, Mr. Riolo admitted that he did not conduct any independent assessment particular to Verizon's service territory. (*Id*. at 386). Nor did Mr. Riolo present any testimony concerning the service territory of any other non Ameritech-Illinois LEC operating in Illinois. In fact, despite Mr. Riolo's focus on Ameritech, he did not know whether Ameritech was under an obligation to provide service at a standard higher than other LECs as a result of its alternative regulation plan. (*Id*. at 379). Verizon submits that Mr. Riolo's testimony should be given little weight, if any at all, as he provides no basis whatsoever to support the imposition of his proposal on a statewide basis.

Ironically, despite the fact that the City's witness knew nothing about Verizon's Illinois operations, the City's brief first takes issue with Verizon. (City Init. Br., p. 3). It remains Verizon's position that the City's proposed modifications for reporting requirements are inappropriate, unreasonable and unduly burdensome. (Boswell Reb., Verizon Ex. 2.0). Staff has proposed reporting requirements that comport with Section 13-712(f). While the City complains that these requirements are the minimums, the City has offered no compelling evidence as to why all carriers throughout the State should be subject to more burdensome requirements. Moreover, the City's claims regarding legislative intent are nothing more than speculation. (*See e.g*., City Init Br. pp. 3, 6). Nowhere within the City's brief does it cite to specific expressions of legislative intent. Instead, the City offers conjecture. In reality, as even the City admits, Staff's proposed reporting requirements meet Section 13-712(f) of the Act. (City Init Br., p. 6)("…the Commission Staff proposes that the public reports contain the bare minimum of performance data required by the legislation…."). The record provides no basis to go beyond these requirements.

What is offensive about the City's position is its claim that Staff's position is the result of negotiations "with the telecommunications industry." (City Init. Br., p. 6). The City's claim is simply false. What the City fails to state is that it had every opportunity to participate in the workshop process to discuss Part 730. Staff actively sought out comments. Instead, the City did nothing, electing to sit idle and propose its plethora of requirements in testimony, when parties had very limited time evaluate proposals. Despite the City's reliance on the professed "experience" of Mr. Riolo, the City did not bring Mr. Riolo to even one workshop in order to impart his knowledge. (Riolo Tr., p. 379). At best, the City's position is disingenuous. At worst, it is an affront to this Commission and its Staff who have worked to include every party in the process.

In addition to Mr. Riolo's limited knowledge of Illinois-specific issues, he did not quantify the costs of his proposals or conduct any cost/benefit analyses. (*Id*. at 383). As such, the City urges the Commission to impose a multitude of obligations on carriers across the state without any idea as to whether the cost of imposing such requirements—costs ultimately borne by rateypayers—are reasonable compared to any perceived benefits obtained. Such a proposal is poor regulatory policy.

Despite the City's rhetoric, the undeniable fact is that Staff's proposed reporting requirements meet the mandate of Section 13-712(f). As for the balance of the City's proposals regarding record retention and adequacy of service, Sections 730.200 and 730.500 respectively, the Commission should reject these proposals as well. As will be discussed in detail below, the City's proposals are unreasonable and unnecessary. This is a fact upon which Staff concurs. (Staff Init. Br., pp. 37-39, 50-53). Accordingly, the Commission should reject the City's proposal in total.

B. CUB/AG's Proposed Modifications To Part 730 Are Unreasonable Or Unlawful, And Are Not Supported By Compelling Facts Found In The Record

CUB/AG urge the Commission to adopt modifications to Part 730 that are either unreasonable or unlawful. In support of their position CUB/AG rely upon the testimony of a witness whose testimony is focused on "policy", not quantitative analysis. (TerKeurst Tr., p. 282 ("I discussed [the proposals] from a policy perspective.")). Ms. TerKeurst conducted no cost/benefit analysis as to the impact of her proposals, although she admitted that her proposals would increase costs to a LEC. (*Id*.) Moreover, Ms. TerKeurst presented no evidence that Verizon or any other non-Ameritech-Illinois LEC was experiencing service quality issues. (*Id*. at 280).[1] Indeed, CUB/AG recognize that Verizon has been meeting the Commission's standards for the provision of basic local exchange service for some time. (CUB/AG Init. Br., p. 3).

Absent any evidence whatsoever to suggest that Verizon or any other non-Ameritech-Illinois LEC is experiencing issues related to the provision of basic local exchange service, the threshold question before the Commission is whether the evidentiary record supports the increased regulatory burdens CUB/AG seek to impose on a statewide basis. The answer is no. Part 730 is a rule of general applicability to LECs throughout the State. CUB/AG presents the Commission no factual basis to increase the burdens of regulation across the State. In fact, CUB/AG did not even quantify the costs of its proposals, nor did it attempt to quantify perceived benefits. Instead, without the benefit of compelling factual support CUB/AG offers to impose new, burdensome regulatory obligations on carriers that are providing quality basic local

[1] Question to Ms. TerKeurst:

> Am I correct that you have presented no evidence of any customer complaints regarding the provision of service, telecommunications service, to customers that are located outside of Ameritech's service territory, isn't that correct?

Answer:

> I did not address that issue in my testimony, that's correct.

exchange service. As will be discussed in detail below, CUB/AG's proposals are simply unreasonable.

With respect to one particular point, CUB/AG invites the Commission to commit reversible error. CUB/AG's proposal concerning penalties is contrary to the Act. (CUB/AG Init. Br., pp. 23-25). On this issue CUB/AG claim the Commission has the unfettered capability to impose penalties of any size for violations of Part 730. (*Id*.). This is not true. As will be discussed in detail below, the Commission's authority to impose fines is limited under Sections 13-304 and 13-305 of the Act. 220 ILCS 5/13-304; 13-305. Here, the Commission should refrain from relying the non-legal opinion of CUB/AG witness TerKeurst, as well as the flawed analysis of CUB/AG. The Commission's ability to impose penalties and fines, as well as the cap on such penalties and fines, is established by statute.

In sum, the evidentiary record fails to support CUB/AG's proposals. CUB/AG seek to ratchet up the regulatory burdens and costs on carriers providing quality basic local exchange service and provide no compelling factual basis for doing so. Moreover, CUB/AG seek to impose such additional, unnecessary burdens without having any idea as to the cost of such an exercise. This is neither prudent nor reasonable. Accordingly, the Commission should reject the application of CUB/AG's proposals.

C. Verizon's Response To Specific Proposals

In its Initial Brief Verizon demonstrated that only limited modifications to the existing Part 730 rule are warranted. These changes are consistent with the Commission's directive to examine and ensure that the rule is clear and consistent. (Initiating Order, p.2). Meanwhile, the City and CUB/AG propose modifications to Part 730 that are illegal, unreasonable, unnecessary, and/or unsupported. There is simply no need to impose a host of new regulatory burdens and

costs on carrier that are providing quality basic local exchange service. Staff also presents certain proposals that are inappropriate or, in one instance, takes a position that is in direct conflict with the authority granted the Commission pursuant to the Act. Each of these flawed proposals is discussed below, in sequence with the proposed rule.

1. Section 730.100 – Application of Part

a. CUB/AG's Proposal To Include Language Addressing Carriers Subject To Alternative Forms Of Regulation Is Wholly Unnecessary And Should Be Rejected

In the first example of their Ameritech-centric approach to this proceeding, CUB/AG propose adding language to Section 730.100 to note that carriers subject to alternative forms of regulation may be subject to additional service standard requirements. (CUB/AG Init. Br., pp. 25-26). The basis for this proposal, of course, relates to the existing alternative regulation plan ("Alt. Reg. Plan") for Ameritech-Illinois. (*Id*.) Staff supports the proposal because Section 13-506.1 (220 ILCS 5/13-506.1) of the Act allows the Commission to impose more stringent standards on carriers allowed to operate under an Alt. Reg. Plan, and to provide other carriers with notice of this fact. (Staff Init. Br., pp. 4-5). These proposals are unnecessary and should be rejected.

Verizon's basis for opposing the inclusion of such superfluous language in Section 730.100 is that it adds no value whatsoever to Part 730. First, as Verizon stated in its Initial Brief, "it is self-evident that the statutory provisions of Section 13-506.1 of the Act supersede a rule." (Verizon Init. Br., p. 8). Here, Staff readily admits that Section 13-506.1 "may establish more stringent service quality standards upon a carrier subject to alternative regulation than are established under Part 730." (Staff Init. Br., p. 4). Accordingly, there is no

need to provide a "cross-reference" to the Act in Section 730.100. Any carrier contemplating whether to operate under an Alt. Reg. Plan knows it must comply with Section 13-506.1.

The second reason for rejecting this proposal is that this language was not necessary when the Commission first approved Ameritech's Alt. Reg. Plan in 1994. (ICC Docket No. 92-0448/93-0239 consol.). Nor was this language needed when the Commission last had the chance to amend Part 730 in ICC Docket No. 98-0453 (Order adopting rule entered August 2000). In that proceeding Staff did not believe such a change was necessary even though Ameritech had been operating under an Alt. Reg regime for several years. The record in this proceeding offers no change in fact to support modifying this Section.

Finally, Staff's concerns about "notice" are misplaced. Section 13-506.1 applies only to carriers providing non-competitive services. As such, competitive local exchange carriers ("CLECs") are excluded. Meanwhile, every incumbent local exchange carrier ("ILEC") in the State is aware that a carrier operating under an Alt. Reg. Plan may be subject to more stringent standards of service. Hence, there is no notice issue and no need to add unnecessary language to Section 730.100.

In sum, there is no need to burden Part 730 with excess verbiage. Part 730 provides carriers with the standards for providing basic local exchange service. If a carrier wishes to operate under an alternative form of regulation it is clear, as Staff acknowledges, that Section 13-506.1 provides the Commission with the authority to impose service standards more stringent than those under Part 730. There is no need to restate that fact in this rule. Accordingly, CUB/AG's and Staff's proposed modifications to Section 730.100 should be rejected, and the Section should remain in its current form.

2. Section 730.105 – Definitions

a. Emergency Situation

Verizon opposes Staff's proposal to limit the "emergency situation" exclusion for strikes and work stoppages to seven days. First, contrary to Staff's claim, such a limitation is preempted under federal law. Second, Staff's sole basis for imposing the limitation, to be consistent with Part 732, is belied by the Commission's recent action to rehear that precise issue in that proceeding. As demonstrated in the arguments below, Staff's proposed limitation should be rejected, and the definition amended as set forth in Verizon's Initial Brief. (Verizon Init. Br., pp. 8-9).

i. Contrary to Staff's Claim, The Commission Is Preempted From Limiting The Definition Of An Emergency Situation Exemption For Strikes Or Work Stoppages To Seven Days

The proposed limitation to the definition of "Emergency Situation" for strikes or work stoppages in Section 730.110 is preempted by the National Labor Relations Act, 29 U.S.C. §§151 *et seq*. ("NLRA"), because it is an attempt to regulate conduct protected by federal law.[2] As a result, the proposed limitation will not survive judicial scrutiny. More particularly, the proposed revision infringes on the right of management and unions to bargain collectively under Section 7 of the NLRA, 29 U.S.C. §157, by presenting utilities with the choice to either settle a strike within seven days or face punishment by the state in the form of penalties, fines or customer credits (under current Part 732). By this proposal, Staff, in effect, attempts not only to

[2] The Supremacy Clause of the United States Constitution secures federal rights by according them priority whenever they come in conflict with state law. The Clause states that "the Laws of the United States which shall be made in Pursuance [of the Constitution]…shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Congress enacted the NLRA in 1935 and intended that federal labor law occupy the area governing relations between management and unions. *See Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees of America v. Wisconsin Employment Relations Bd.*, 340 U.S. 383, 399 (1951). Accordingly, the NLRA preempts any state statute (here, the proposed amendment of 83 Ill. Adm. Code title 83, §732) that conflicts or interferes with it. *See Cannon v. Edgar*, 33 F.3d 880, 884 (7th Cir. 1994) (citing *Rose v. Arkansas State Police*, 479 U.S. 1, 3 (1986); *Hawaiian Airlines, Inc v. Norris*, 512 U.S. 246 (1994)).

set a time limit on negotiations and any strike that may result, but also to dictate the outcome of negotiations and to fine management for failure to promptly settle a labor dispute. This clearly and impermissibly changes the balance of power between labor and management in collective bargaining.

Two preemption doctrines makes Staff's proposal contrary to federal law. The National Labor Relations Board ("NLRB"), not the states, has jurisdiction to regulate collective bargaining (so-called *Garmon* preemption); the proposed legislation also is preempted by federal law because it seeks to regulate activity that is to be left unregulated and is both protected by, and reserved for, the interplay of economic forces (so-called *Machinists* preemption).

ii. The Proposed Amendment Is Preempted Because It Attempts To Regulate Activities The NLRA Protects

The *Garmon* preemption, first articulated by the United States Supreme Court in *San Diego Blg. Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959), "forbids state and local regulation of activities that the NLRA protects or prohibits or arguably protects or prohibits." *See Cannon v. Edgar*, 33 F.3d 880, 884 (7th Cir. 1994) (citing *Building and Trades Council v. Associated Builders and Contractors of Massachusetts/Rhode Island*, 507 U.S. 218 (1993)). The *Garmon* doctrine prevents conflicts between state and local regulation and the federal regulatory scheme embodied in the NLRA. *See Cannon*, 33 F.3d at 884. Indeed, almost precisely what the Commission is attempting to do with the proposed limitation previously has been attempted in Illinois, albeit in connection with another statute, reviewed by the courts, and held preempted by the NLRA.

In *Cannon v. Edgar*, 33 F.3d 880, the Seventh Circuit reviewed the Illinois Burial Rights Act and determined that it was preempted. The Illinois Burial Rights Act was enacted in

response to a strike by a union of grave diggers. It required that cemeteries and grave diggers negotiate the establishment of a pool of workers designated to perform religiously required internments during labor disputes. Under that Act, if the parties could not reach a labor pool agreement and, as a result, bodies remained unburied, the parties could be fined.[3]

The Seventh Circuit easily found that "[t]he NLRA does not permit this kind of direct state regulation of the collective bargaining process" and that the Burial Rights Act was preempted by the NLRA under *Garmon*. *See Cannon*, 33 F.3d at 885. The court explained that the NLRA is an extensive statutory scheme that regulates the collective bargaining relationship between employers and unions. *See Cannon*, 33 F.3d at 883. Among other things, the NLRA enumerates unfair labor practices by both employees and employers, 29 U.S.C. § 158(a) and (b); it defines as an unfair labor practice the refusal by an employer to bargain collectively with a labor union representing its employees. *See* 29 U.S.C. §158(a)(5). The NLRA, however, does not require that the parties reach agreement. *See Cannon*, 33 F.3d at 884. Rather, with the exception of requiring parties to bargain in good faith, 29 U.S.C. §158(a)(5), the NLRA allows parties to conduct the bargaining process free of government intrusion. *See Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 616 (1986), *cited in Cannon*, 33 F.3d at 883-84.

Thus, the parties to a collective bargaining agreement determine its content. Under no circumstances does the government—even the federal government—have authority to dictate the terms of a collective bargaining agreement, much less the time frame in which an agreement much be reached. To allow any governmental power to mandate the terms of a collective bargaining agreement would violate a fundamental premise of the NLRA: "private bargaining

[3] Similarly, the proposed revision to Part 730 provides that, if labor and management can not reach an agreement within the first seven days of a strike and customers lose service, a company can be subject to the imposition of fines.

under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *See H.K. Porter v. NLRB*, 397 U.S. 99, 108 (1970). *See also* Section 8(d) of the NLRA, 29 U.S.C. § 158(d). In short, the Seventh Circuit found that Illinois' Burial Rights Act was preempted by the NLRA under *Garmon* because it amounted to direct regulation of the collective bargaining process. *See Cannon*, 33 F.3d at 885

The proposed limitation to the definition of "Emergency Situation" under Section 730.105 likewise contravenes fundamental principles of the NLRA because it seeks to compel the parties to a contract to end a strike within seven days.[4] Thus, just as the Burial Rights Act unlawfully interfered with the bargaining process by fining the parties to a collective bargaining agreement for not negotiating for a pool of workers designated to perform internments during labor disputes, the proposed limitations to the definition of "Emergency Situation" is to the same effect with its system of penalties and fines, i.e. it fines a party to a collective bargaining agreement—management—for not ending a strike. It is therefore preempted. *See Cannon*, 33 F.3d at 885. *See also*, *e.g.*, *Golden State*, 475 U.S. at 619 (holding that city could not condition renewal of a cab license on settlement of labor dispute by a certain date).

To be sure, in *Cannon*, the Seventh Circuit recognized that there are exceptions to *Garmon* preemption. These exceptions, however, apply only "in matters of general state law—in

[4] Indeed, the state has no power to force parties to settle a labor dispute on any terms. *See Golden State*, 475 U.S. at 619; *Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322, (D.C. Cir. 1996). Such official compulsion is strictly forbidden by the NLRA because it is "tantamount to regulation" and thus preempted because of its interference with collective bargaining. *See Reich*, 74 F.3d at 1332-39.

particular, criminal and tort law."[5] *Cannon*, 33 F.3d at 884 (citing *Farmer*, 430 U.S. 290). The *Garmon* exceptions did not apply in *Cannon* because the Illinois' Burial Rights Act did not raise tort or criminal law issues. *See Cannon*, 33 F.3d at 885. Nor does the proposed limitation to the definition of "Emergency Situation" in Section 730.105.[6] Therefore the exceptions to *Garmon* preemption are inapplicable.

iii. The Proposed Limitation Is Preempted Because It Interferes With The Economic Forces That Influence Collective Bargaining

Machinists preemption, prohibiting state and municipal regulation of areas that Congress left to the free play of economic forces, also precludes intrusion by the state into the collective bargaining process. *See Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1975), *cited in Cannon*, 33 F.3d at 886. *Machinists* preemption preserves Congress' intent, established in the NLRA, to allow management and labor to advance their respective interests by use of their economic weapons. *See Building and Trades Council*, 507 U.S. 218; *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 749 (1985), *cited in Cannon*, 332 F.3d at 885.

[5] For example, the Supreme Court has held that the NLRA did not preempt a state tort action based on intentional infliction of emotional distress brought by a union member against his union. *See Farmer v. United Bhd. of Carpenters and Joiners*, 430 U.S. 290, 296 (1977). *See also Belknap*, 463 U.S. at 498 (NLRA does not preempt state law action for misrepresentation and breach of contract against employer); *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978) (NLRA does not preempt state law claim for intentional infliction of emotional distress); *Keehr v. Consolidated Freightways of Delaware, Inc.*, 825 F.2d 133 (7th Cir. 1987) (same).

[6] Even if the proposed amendment to 83 Ill. Adm. Code title 83, §732 was a matter of common law, which it is not, the *Garmon* exceptions still would not save Section 732 from preemption. "A claim is not preempted under *Garmon* if the regulated activity is (1) merely of peripheral concern to the federal labor laws or (2) touches interests deeply rooted in local feeling and responsibility." *Cannon*, 33 F.3d at 884 (citing *Belknap, Inc. v. Hale*, 463 U.S. 491, 498 (1983)). As in *Cannon*, the proposed revision to 83 Ill. Adm. Code title 83, §732 is a direct intrusion into the collective bargaining process that is by no means "peripheral" to the NLRA. Indeed, the proposed revision goes right to the heart of matters central to the statute—bargaining and strikes. *See Cannon*, 33 F.3d at 885. Nor are the proposed revisions "deeply rooted in local feeling." *See Cannon*, 33 F.3d 880. Indeed, like internment of the dead, the loss of utilities service on occasion "is something common to every community in the United States." *See Id*. at 885. Said otherwise, temporary loss of phone service, while perhaps aggravating to customers, plainly does not meet the legal definition of "something deeply rooted in local feeling." *See Id*.

As the Seventh Circuit explained: "Congress has been rather specific when it has outlawed particular economic weapons. Congress left some forms of economic pressure unregulated, while it banned others. States therefore are prohibited from imposing additional restrictions on economic weapons of self-help, such as strikes or lockouts." *See Cannon*, 33 F.3d at 885 (citing and quoting *Golden State*, 475 U.S. at 614) (internal cites and quotations omitted). Illinois is once again attempting to unlawfully impose economic pressure in an area that Congress intentionally left unregulated.

In *Cannon*, the Seventh Circuit found that the Illinois Burial Rights Act was preempted by *Machinists* (as well as by *Garmon*) because the Act interfered "with the economic forces that influence collective bargaining." 33 F.3d at 885. The *Cannon* court found that Illinois had "meddled with" the collective bargaining process in a variety of ways, including by ordering the parties to negotiate as to a specific condition and by placing sanctions on the parties for failing to agree. *See Id*.

Like the Burial Rights Act, the proposed limitation to the definition of "Emergency Situation" meddles in the bargaining process. It gives utilities a choice: settle a strike or face financial punishment by the state in the form of penalties and fines. *See e.g.*, *Cannon*, 33 F.3d at 885. The Supreme Court has held that placing such a limitation on the bargaining process is not permissible because the NLRA "leaves the bargaining process largely to the parties…. It does not purport to set any time limits on negotiations or economic struggle. Instead, the Act provides a framework for the negotiations; it 'is concerned primarily with establishing an equitable process for determining terms and conditions of employment.'" *Id.* at 616 (citing *H.K. Porter, Inc.*, 397 U.S. at 103 and quoting *Metropolitan Life Ins. Co.*, 471 U.S. at 753).

It is the parties' right to choose to negotiate an agreement, or to hold out to achieve the terms they seek. The state has no power to set a time limit on either party's use of the economic weapons at its disposal. Thus, like the Burial Rights Act, the proposed limitation to the definition of "Emergency Situation" attempts to regulate an area that Congress left to the free play of economic forces, and is preempted under *Machinists. See Machinists*, 427 U.S. 132 *cited in Cannon*, 33 F.3d at 886.

In sum, the proposed limitation to the definition of "Emergency Situation" under Section 730.105 is preempted by the NLRA because it is an attempt to regulate conduct protected by federal law. The proposed limitation is preempted under *Garmon* because, by effectively setting a time limit on negotiations and by punishing management for not ending a strike within seven days, it infringes on the rights of management and unions to bargain collectively under the NLRA. The proposed limitation also is preempted under *Machinists* because it attempts to regulate in an area that Congress intended to leave to the free play of economic forces. Thus, the proposed limitation to the definition of "Emergency Situation" under Section 730.105 is contrary to federal law and should not be adopted.

iv. Staff's Basis For Limiting The Emergency Situation Exemption Is Not Valid

The sole basis for Staff proposing to limit the emergency situation exemption related to strikes or work stoppages comes from the Commission's action related to Part 732. (Staff Init. Br., pp. 8-9). However, the Commission has granted rehearing to reconsider its decision on this precise issue. Absent any other factual basis for supporting Staff's proposed limitation, the Commission should not adopt Staff's proposal.

During the initial proceeding to consider Part 732, no evidentiary proceedings took place. Unlike that proceeding, evidence has been presented demonstrating that the proposed seven-day limitation to an emergency situation resulting from strikes or work stoppages is impractical and interferes with a labor/management dispute. (Boswell Dir., Verizon Ex. 1.0, pp. 17-18). There is no compelling evidence to the contrary.

The Commission should not interfere with a labor/management dispute based on a position that is legally infirm and unsupported by evidence. Here, there is no basis upon which penalize a LEC for missing a service standard due to a strike or work stoppage. Accordingly, the Commission should not adopt Staff's proposed limitation on emergency situations created as a result of strikes or work stoppages. Instead, the Commission should amend Staff's proposal as follows:

> (B) an act of third parties, including acts of terrorism, vandalism, riot, civil unrest or war, or acts of parties that are not agents, employees or contractors of the local exchange carrier, or ~~the first 7 calendar days of a strike or other work stoppage~~ a strike or other work stoppage; or

b. Installation Trouble Report

i. The City's Proposal To More Than Quadruple The Period For Installation Trouble Reports Is Unreasonable And Unsupported

The City's proposal to more than quadruple the time period where an installation can be subject to an "installation trouble report" is simply unreasonable. The City provided no support for this proposal. Moreover, as discussed in detail in this brief and in Verizon's Initial Brief, the City presented no evidence as to why such a requirement should be imposed on every LEC in the State. (Verizon Init. Br., pp. 5-7). Indeed, the City's witness, Mr. Riolo, conducted no investigation regarding the service being provided by Verizon, or any other LEC besides

Ameritech-Illinois. (Riolo, Tr., pp. 380-82, 386). And, even with Ameritech-Illinois, Mr. Riolo could not recall whether that carrier was held to a higher or lesser standard for providing basic local exchange service under its Alt. Reg. Plan. (Riolo, Tr., pp. 378-79). It is clear from the record that there is no factual basis to adopt the City's proposal on a rule of general applicability to every LEC in the State.

Verizon objects to the City's proposal on this issue, and in total. As set forth in the testimony of Verizon witness Karen Boswell, the City's overall proposal is unnecessary, unrealistic and unreasonable. (Boswell Reb., Verizon Ex. 2.0). Given that the City cannot claim, let alone demonstrate, the need to impose such drastic increases in regulatory burdens on a statewide basis, the City's proposal should be rejected.

On this issue, Staff agrees. Staff rejects the City's proposal as being unsupported. (Staff Init. Br., pp. 11-12). Staff's proposed definition for "Installation Trouble Report" is based upon meetings with workshop participants (of which Mr. Riolo did not attend (Riolo Tr., p. 379)), and is consistent with the Federal Communications Commission ("FCC") reporting requirements. (*Id*.) Accordingly, Verizon supports Staff's definition of "Installation Trouble Report" and urges the Commission to reject the City's unsupported proposal.

c. Out of Service > 24 Hours

CUB/AG and Staff each object to Verizon's proposal to exclude from the definition of "Out of Service > 24 Hours" ("OOS>24") subsection (B), "cannot be called." (Verizon Init. Br., pp. 9-10). Each of their objections conflict with the record in this proceeding and result in poor regulatory policy. Verizon's proposed modification to Staff's rule ensures that those customers who cannot call out to obtain emergency service, or make any calls for that matter, will be the first to have service repaired. (Boswell Dir., Verizon Ex. 1.0, p. 18). As discussed below,

CUB/AG's and the Staff's objections to Verizon's proposal are unavailing and should not be adopted.

i. CUB/AG Mischaracterize Verizon's Position And The Record, And Their Claim Simply Misses The Point

Verizon's proposal seeks to ensure that customers who cannot make calls receive repair service first. (Boswell Dir., Verizon Ex. 1.0, p. 18). Somehow, CUB/AG claim that Verizon is attempting to "degrade" the service standard. (CUB/AG Init. Br., p. 3). CUB/AG's position is nonsense and should be rejected.

First, CUB/AG claim that "Verizon's proposal should be rejected because it would degrade the out of service standard *by applying it to a significantly smaller universe of out of service situations*." (*Id*.) (emphasis added). CUB/AG's statement is wholly unsupported, which is probably why they include no record citation to support it. An examination of the record finds no basis to claim that Verizon's proposal would "significantly" reduce the universe of out of service situations. Indeed, Staff even recognizes that "[I]n most out of service conditions, service will be complete –that is, no dial tone", rather than situations where a customer cannot receive a call. (Staff Init. Br., p. 13). It is readily apparent that CUB/AG's claim is wrong.

Second, CUB/AG claim that "[t]here is no evidence that the definition proposed by Staff is anything but consistent with the current practice of Illinois carriers." (CUB/AG Init. Br., p. 3). Here, CUB/AG's claim is patently contrary to the record. Verizon witness Boswell testified that the purpose for establishing a separate OOS standard has been to ensure that customers who have lost *all* service be the first to have their service repaired. (Boswell Dir., Verizon Ex. 1.0, p. 18).

Indeed, even Staff recognized Verizon's argument. (Staff Init. Br., p. 13). Contrary to CUB/AG's incorrect assertion, the record does demonstrate that the current practice of carriers may be different from what CUB/AG believes.

Finally, CUB/AG's reliance on Ms. TerKeurst's testimony on this point highlights their fundamental misunderstanding of the issue. (CUB/AG Init. Br., pp. 3-4). Initially, it must be noted that the bulk of Ms. TerKeurst's statement on this point is nothing more than speculation. She offers no evidence. Rather, her testimony contemplates events that "may" happen. As for the substance of her testimony and CUB/AG's position, they fail to account for the fact that a customer will receive a credit pursuant to Part 732 if the customer cannot receive a call and it is not repaired within 24 hours. 83 Ill.Adm. Code 732.

Customers are entitled to prompt repair. Under Part 732, a customer may be entitled to a credit if the customer cannot receive a call and the problem is not resolved within 24 hours. That requirement is an absolute standard. Here, however, Part 730 measures aggregate performance and LECs must meet a minimum threshold. Verizon's proposal does not degrade any standard. Rather, it seeks to ensure that customers who are unable to make calls receive priority service.

Verizon has and continues to provide quality basic local exchange service to its customers. Even CUB/AG recognize this fact. (CUB/AG Init. Br., p. 3). CUB/AG provide no compelling basis to reject Verizon's proposal on this issue. Accordingly, the Commission should adopt Verizon's proposed amendment to the OOS > 24 definition.

ii. Staff's Position Inappropriately Compares Part 730 And Part 732

Staff's objection to Verizon's proposed modification to the definition of OOS>24 is based upon an inappropriate comparison of Part 730 and Part 732. (Staff Init. Br., pp. 12-14).

As set forth in the previous section of this brief, Part 732 addresses the issue of *individual* customer credits related to the provision of service. Meanwhile, Part 730 establishes the standards for providing basic local exchange service on a *system-wide basis*. While these code parts address similar issues each serve a different purpose.

Other than asserting the need for consistency, Staff offers no factual basis for this requirement. Here, Staff's brief provides no citation to the record to support its objections to Verizon's proposed modification other than the statement that Staff's proposed definition was developed subsequent to the conclusion of workshops. (Staff Init. Br., pp. 12-14). If Staff's concern is to provide incentives to carriers to repair service, those incentives are already found in Part 732 through the imposition of customer credits. Unlike Part 732, Part 730 measures performance on an aggregate basis. There is no compelling reason to have Part 730 be "lockstep" with Part 732.

It is Verizon's position that customer's without the ability to make calls should be repaired first. (Verizon Init. Br., pp. 9-10). On an aggregate basis, this is how a carrier should be measured. If, for whatever reason, a particular customer cannot receive a call and meets the requirements of Part 732, that customer will receive a credit. The evidentiary record supports Verizon's position. In fact, there is no factual evidence to support a contrary result.

d. Additional Proposed Definitions

i. The City's Proposed Addition Of 29 More Definitions Should Be Rejected

The City proposes the inclusion of no less than 29 new definitions to Staff's proposed rule. These definitions result from the various other proposals advanced by the City. For the reasons set forth earlier in this brief and in Verizon's Initial Brief, there is no record support and

no reasonable basis to adopt the City's proposals. Notably, Staff also finds the City's proposals to be unnecessary and burdensome and opposes the inclusion of the subject definitions. (Staff Init. Br., p. 15). Accordingly, there is no need to adopt the City's 29 new definitions.

3. Section 730.110 - Waiver

It is Verizon's position that Part 730 should apply to all carriers and supports Staff's proposed language for Section 730.110. Additionally, Verizon relies on the arguments set forth in its Initial Brief as a basis to reject the proposed modifications to Section 730.110 proposed by various CLECs.

4. Section 730.115 – Reporting

a. CUB/AG's Modifications To Staff's Proposed Reporting Section Are Illegal or Unreasonable

Verizon urges the Commission to adopt Staff's proposed Section 730.115 and reject CUB/AG's attempt to redraft the statutory provisions of Section 13-712(f). Not only does CUB/AG interpretation of Section 13-712(f) attempt to redraft the Act, they remarkably, for the first time in their Initial Brief, propose an entirely new "appendix" to be added to Part 730. (CUB/AG Init. Br., pp. 20-21).[7] CUB/AG's basis for their proposal is factually flawed and inconsistent with the Act. Meanwhile, Staff's proposed reporting requirements are consistent with the law and should be adopted.

CUB/AG invite the Commission to impose a regulation contrary to the Act. Section 13-712(f) provides that a carrier will report to the Commission information that is:

[7] CUB/AG's appendix proposal is procedurally improper. First, this proposal was not made during the course of the evidentiary proceeding, despite having ample time to do so. Second, no party had an opportunity to conduct cross-examination related to the document. Accordingly, Verizon moves to strike the last full paragraph of page 21 through the end of Section III, which concludes on page 23.

> disaggregated for each geographic area and each customer class *for which the telecommunications carrier internally monitored performance data as of a date 120 days preceding the effective date of this amendatory Act* of the 92nd General Assembly.

220 ILCS 5/13-712(f)(emphasis added). Verizon proposes to submit reports to the Commission pursuant to the Act, which reflects the type of data being internally monitored for state reporting purposes 120 day prior to the effective date of Section 13-712(f).

In contrast, CUB/AG seeks to have Verizon submit data based upon inapplicable federal standards. (CUB/AG Init. Br., pp. 17-18). As Ms. Boswell explained during cross-examination, federal reporting is completely different than State reporting. (Boswell Tr., p. 243). Ms. Boswell noted that, for example, the definitions of terms are different. (*Id*.). Consequently, the federal and state measurements are vastly different. (*Id* at 259).

What is clear is that under State rules, Verizon monitored data in a particular manner. It is based upon these rules, not federal rules, that information must be supplied. There is simply no basis from which to infer that Section 13-712(f) requires a carrier to report inapplicable federal data to this Commission. Consequently, it is CUB/AG, not Ms. Boswell that seeks to redraft Section 13-712(f). Accordingly, the Commission should reject CUB/AG's illegal proposal and adopt the lawful reporting requirements set forth in Staff's proposed Section 730.115.

b. The City's Proposed Modifications Are Unreasonable And Inappropriate

Verizon urges the Commission to reject the City's proposed modification to Staff's proposed Section 730.115 for the reasons set forth earlier in this brief (*see* Section II A above) and in its Initial Brief. Additionally, Verizon supports Staff's various criticisms of the City's

proposals for this Section. (Staff Init. Br., p. 28). The Commission, therefore, should reject this City's proposal.

c. Staff's Proposal Addressing Recourse Credits Should Be Rejected

In this Part 730 rule, Staff proposes to incorporate rules that are properly left for Part 732. In particular, Staff proposes to remedy the omission of recourse credit issues by inserting language in Section 730.115(c). (McClerren Reb., Staff Ex. 3.0, p. 9). Verizon submits that it is entirely improper to include in this rule language that is best left for Part 732.

5. Section 730.120 – Penalties

Verizon agrees with Staff's proposed language in Section 730.120, subject to certain modifications set for in its Initial Brief. (Verizon Init. Br., pp. 12-14). Verizon urges the Commission to adopt its proposed amendments to Section 730.120, which reflect only the statutory provisions related to the imposition of penalties and fines.

a. CUB/AG Invite The Commission To Commit Reversible Error By Claiming That Section 13-305 Of The Act Is Inapplicable To Part 730

The Commission has only those powers granted to it by the General Assembly. *Business and Professional People for the Public Interest v. Commerce Comm'n*, 136 Ill 2d 192, 201 (1989). As an administrative agency, the Commission is bound to act within the authority provided under the Act. *City of Chicago v. Illinois Commerce Commission*, 79 Ill.2d 213, 217-18, 402 N.E.2d 595 (the Commission's powers are derived solely from the Act, and its authority is limited by grants of the Act.). In this instance, the General Assembly has authorized the Commission pursuant to Section 13-305 of the Act to impose penalties or fines, when necessary. 220 ILCS 5/13-305. Section 13-305, however, expressly limits the amount of the penalty that the Commission can impose. Somehow, CUB/AG asserts that Section 13-305 does not apply to this proceeding. (CUB/AG Init. Br., pp. 23-26).

Contrary to CUB/AG's claim, Section 13-712 does not supersede Section 13-305. Section 13-712 does not provide for a differing penalty structure, it allows for the Commission to impose a penalty, when necessary, for violations of service standard rules. Section 13-712 does not give the Commission *carte blanche* to impose penalties beyond the ceiling set forth in Section 13-305. Section 13-305 expressly states that it will apply "in a case in which a civil penalty is not otherwise provided for in this Act...." Section 13-712 does not provide for the amount of the penalty, only that a penalty can be imposed. Accordingly, Section 13-305 is directly applicable and should be reflected in the Section 730.120 language as Staff proposes.

CUB/AG's position on this point defies logic. For years this Commission and other parties sought to increase the amount of penalties it could impose under Section 5-202 of the Act. (TerKeurst Tr., p. 275). Only after several years of rigorous debate about the size of the increase did the General Assembly pass Section 13-305. Now, less than a year later, CUB/AG claims that the Commission has no cap on its penalty authority. Such a position is disingenuous.

CUB/AG's claim that the Commission has no cap on the level of penalties and fines it can impose is contrary to law. Section 13-712 does not provide the Commission unfettered discretion in the amount of penalty or fine it can impose. Instead, Section 13-712 allows for the imposition of a penalty or fine and Section 13-305 continues to establish the ceiling for any such penalty. The Commission, therefore, should reject CUB/AG's position on this point.

b. Staff's Objections To Verizon's Proposed Modifications To Section 730.120 Are Unpersuasive

Staff offers several arguments objecting to Verizon's modification of Staff's proposed penalty language, each of which are unavailing. First, Staff disagrees with Verizon's proposal to strike the phrase "or other users of the network". (Staff Init. Br., p. 32). Staff states that the

legislature directed the Commission to consider other users when considering penalties. Verizon does not dispute that fact. However, Part 730 focuses on end-use customers, not "other users of the network." Accordingly, it is inappropriate to consider a "category of harm" for purposes of assessing a penalty in a rule that is not applicable to that category.

Staff's second objection concerns Verizon's proposal for the Commission to consider the due diligence of a carrier when contemplating the need for and amount of a penalty. (*Id*.). Despite its objection, Staff readily admits that the Commission may consider the due diligence of a carrier. (*Id* at 33). Moreover, Staff properly includes Section 13-305 in its penalty provisions. Plain reading of Section 13-305 incorporates the considerations found in Section 13-304 for assessing penalties. Verizon's proposal simply seeks to incorporate the existing due diligence considerations found in Section 13-304 into the provisions of Section 730.120.

The most troubling aspect about Staff's brief is found in its discussion of penalties. Here, Staff attempts to draw a distinction where none exists. In particular, Staff claims that Section 13-712 provides the Commission, if it desires, to impose a penalty of any size. (Staff Init. Br., pp. 34-35). Like CUB/AG, Staff invites the Commission to commit reversible error. Neither the law nor logic support Staff's position on this point, and Verizon refers to the preceding argument to support its position.

6. Section 730.200 – Preservation of Records

Verizon proposes that Section 730.200 remain in its current form. The City, meanwhile, proposes a number of changes that are unreasonable and inappropriate for a rule of general applicability. For the sake of brevity, Verizon relies on earlier arguments in this brief to support rejecting the City's proposal. (*See* Section II A above).

Notably, Staff also proposes rejection of the City's amendments to this Section for several reasons, pointing to the fact that the City's proposals appeared to be directed at one particular carrier. (Staff Init. Br., p. 38). Verizon supports Staff's comments on this point.

7. Section 730.205 – Additional Reporting Requirements

The City proposes 41 new measures that all LECs should track and report on a quarterly basis. Stated simply, there is no record evidence to support adoption of this proposal on a statewide basis. The City failed to make any case why all LECs should be subject to this provision. (*See* Section II A above). Staff agrees, stating that the City's proposal is unworkable, "particularly in a rule of general applicability." (Staff Init. Br., p. 40). As set forth in argument earlier in this brief, the City's proposal is unreasonable and not supported by the record. The Commission, therefore, should reject the City's proposal on this point.

8. Sections 730.305, 730.25, and 730.340

Verizon continues to support Staff's proposed changes to Section 730.305, 730.325, and 730.340. (Boswell Dir., Verizon Ex. 1.0, p. 7).

9. Section 730.500-Adequacy of Service.

The City proposes modifying the existing Section 730.500 to add 11 new methodologies that investigate facility assignment and provisioning. (City Init. Br., pp. 31-33). Verizon objects to this proposal for the reasons set forth earlier addressing the City's flawed claim. (*See* Section II A above). There is simply no basis to apply this requirement on a statewide basis. Moreover, Verizon supports Staff's criticisms of the City's proposal. (Staff Init. Br., pp. 51-52). Accordingly, the Commission should reject the City's proposed amendments to Section 730.500.

10. Section 730.510 – Answering Time

Verizon proposed the elimination of the abandoned call rate reporting requirement found in Section 730.510(b)(3). While Staff opposes Verizon's proposal, Staff's position is unpersuasive. Staff has readily admitted that there are any number of reasons, unassociated with a carrier's performance, why a customer may abandon a call. (Jackson Tr., pp. 460-61). Moreover, Staff witness Jackson admitted that there is no way for a LEC to measure or survey the customer as to why the customer abandoned a particular call. (*Id*. at 461). Moreover, as set forth in Verizon's Initial Brief, the Commission declined a proposal to measure abandoned calls less than two years ago. (Verizon Init. Br., pp. 15-16). As such, the Commission should adopt Verizon's proposal to eliminate the imprecise abandoned call rate reporting requirement.

11. Section 730.535 – Interruptions of Service

a. For Purposes Of Part 730, A Payphone Provider Is Not Like Other Customers

In its Initial Brief, Verizon proposed to modify Section 730.535(d) to exclude payphone equipment. (Verizon Init. Br., pp. 16-17). In opposing this proposal Staff states only that payphone providers should be treated like any other customer. (Staff Init. Br., p. 66). Verizon respectfully disagrees. As Verizon witness Boswell testified, many times trouble occurring with payphone lines is with the equipment, not the line. (Boswell Sur., Verizon Ex. 3.0, p. 20). Thus, payphone equipment is checked first before the line, usually after the 24-hour time interval for repairs has elapsed. (*Id*.). Consequently, it is Verizon's position that for purposes of Part 730, a payphone provider is not similar to other customers. As such, a LEC should not be penalized as a result of outages occurring on a payphone line.

b. CUB/AG's Proposed Calculation C Is Wholly Inappropriate And Should Not Be Adopted

Under Staff's proposed Section 730.535, that Section sets forth two methods for calculating OOS>24. (*See* Section 730,535(b)). These two methods are identified as "Calculation A" and "Calculation B". Under Staff's proposal, Calculation A is the official reporting methodology for reporting OOS trouble, while Calculation B would be conducted by a carrier upon request of the Commission. The difference between the two calculations is that Calculation A includes trouble related to emergency situations in the denominator, not the numerator. Meanwhile, Calculation B excludes trouble due to emergency situations from both the numerator and the denominator. Staff's proposal reflects "the workshops [sic] best effort at developing a clear and consistently applied and reported standard." (Staff Init. Br., p. 65; Staff Ex. 1.0, p. 11). Verizon fully supports Staff's proposal.

Contrary to the "practical" approach proposed by Staff (McClerren Tr., p. 493), CUB/AG interpose an alternative, "Calculation C".[8] As proposed, Calculation C would include in both the numerator and denominator of the calculation trouble due to emergency situations. CUB/AG's proposal does not square with operating reality. The contrast between Calculation A and Calculation C is stark.

Under Calculation A, emergency situations are not included in the numerator (total number of OOS>24 hours), as such situations are properly excluded from a determination of whether a LEC is providing quality basic local exchange service. Meanwhile, emergency situations are included in the denominator because a LEC remains obligated to repair outages

[8] Notably, CUB/AG had every opportunity to present this proposal during the workshop process. Instead, like the City, it did nothing and waited to first unveil Calculation C in testimony. Indeed, CUB/AG witness TerKeurst did not participate in any workshop and did not know with precision the extent of CUB/AG's participation in the workshop process. (TerKeurst Tr., pp. 271-72).

caused by emergency situations and "it is a workload that still has to be maintained and performed." (McClerren Tr., p. 520). Calculation A, then, properly accounts for the fact that a carrier is obligated to repair all outages, regardless of their cause or duration. As Staff noted in its brief:

> In an emergency situation a carrier has to commit resources to repair out of service conditions that it would not normally have to commit. This increase the likelihood that the carrier may fail to meet other service quality standards, since it would have less technical personnel to address those situations than it would under normal circumstances.

(Staff Init. Br., p. 67). Accordingly, it is appropriate exclude emergency situations from the numerator and include such situations in the denominator of the calculation.

Meanwhile, Calculation C seeks to include emergency situations in the numerator. (TerKeurst Tr., p. 288). By doing so, CUB/AG seek to hold a carrier responsible for missing standards due to emergency situations. (*Id.* at 289-90). For, under Calculation C, if a carrier misses the mark, they must go to the Commission and explain why. (*Id*.). CUB/AG's position is patently unreasonable.

The Commission should reject CUB/AG's claims concerning Section 730.535. Contrary to their assertions, many of which are new and not found in their witnesses' testimony (s*ee* CUB/AG Init. Br., pp. 4-11), Staff's proposal in no way weakens the out of service standard. In reality, CUB/AG propose a standard destined to have LECs fail when an emergency situation arises. Such a result unreasonable and should be rejected.

12. Section 730.540 – Installation Requests

Verizon supports Staff's proposed modifications to Section 730.540, except for subsection (e). It is Verizon's position that subsection (e) is unnecessary. (Boswell Dir., Verizon

Ex. 1.0, p. 21; Verizon Init. Br., pp. 17-8). Staff opposes Verizon's position on this point. (Staff Init. Br., pp. 71-72). However, Staff offers no citation to the record to support its claims. It remains Verizon's position that Section 730.540(e) is unnecessary, and it urges the Commission to delete that subsection from the rule.

Verizon, meanwhile, fully supports Staff's opposition to the CUB/AG proposal to impose yet more reporting requirements: this time in subsection 730.540(a). First, there is no factual basis to modify the existing standard. (*See* Section II B above). Second, as set forth in Staff's brief, the CUB/AG proposal provides no meaningful information. (Staff Init. Br., pp. 72-73). As such, CUB/AG's proposal should not be adopted.

Verizon also objects to CUB/AG's proposed modification to subsection 730.540(c). Here, again, there is no factual basis to impose more stringent requirements on carriers who are providing quality service. (*See* Section II B above). Moreover, Staff also finds CUB/AG's proposal unreasonable. Accordingly, this proposal should be rejected as well.

Additionally, Verizon objects to CUB/AG's proposed modification to subsection 730.540(e). As noted earlier, it is Verizon's position that Staff's proposal on this subsection is unnecessary. Given that CUB/AG seeks to further expand the regulatory burdens contemplated under this part, Verizon objects. For the reasons set forth earlier in this argument, and the reasons set forth in Section II B of this brief, Verizon urges the Commission to reject CUB/AG's proposal.

Finally, Verizon opposes CUB/AG's proposal with respect to Section 730.545(f). As set forth in the preceding argument, it is proper to include in exceptions emergency situations. CUB/AG offer no compelling basis to support its change. Staff's proposal is reasonable and clear. As such, there is no reason to adopt CUB/AG's proposal for this Section.

13. Section 730.545 – Trouble Reports

a. CUB/AG's Attempt To Impose More Stringent Trouble Reports Standard Is Unreasonable And Unnecessary

CUB/AG propose a number of modifications to Section 730.545 that are simply unreasonable. (CUB/AG Init. Br., pp. 29-32). For example, CUB/AG propose that the trouble report standard should be set at "3 reports per 100 access lines per month" instead of the existing "6 reports per 100 access lines per month." (TerKeurst Dir., CUB/AG Ex. 1.0, p. 23). They also urge the Commission raise the repeat trouble reporting standard from 20% to 15% of total trouble reports per month. (CUB/AG Init. Br., p. 30). Finally, CUB/AG urge the adoption of a 10% standard for installation trouble reports. (*Id*.)

The basis for these dramatic increases in standards rests on the following theory: since it appears that some carriers are meeting these standards presently, lets unilaterally raise the bar. (*Id*.) Of course, CUB/AG offer no evidence regarding the cost of meeting such requirements on an ongoing basis. (TerKeurst Tr., p. 282). They also disregard the fact that carriers are providing quality service. Moreover, they offer no evidence that on a statewide basis customers are demanding such heightened standards. Finally, CUB/AG offer no evidence that customers are willing to pay for this heightened level of service quality on an ongoing basis. There is simply no reasonable basis to modify the standards in the manner CUB/AG propose.

CUB/AG's proposal also is an affront to the workshop process. Staff did not divine Section 730.545. Rather, Staff's proposal is the product of thoughtful discussion and contemplation resulting from information gathered during the workshop process (Staff Init. Br., p. 79). Meanwhile, CUB/AG chose to sit idle, waiting to first unveil this proposal in testimony. As Staff stated:

> …Staff would not have adopted this [sic] these standards if we did not believe the entire package of standards and reporting requirements would protect the customer and provide adequate level [sic] of customer service.

(Staff Init. Br., p. 79, citing Staff Ex. 3.0, p. 20).

Verizon supports the vast majority of Staff's Section 730.545.[9] Meanwhile, the evidentiary record does not support the dramatic increase in standards that CUB/AG propose. The Commission should recognize that Staff's proposal is the product of much input and discussion from the parties willing to participate in the process and is reasonable. Therefore, the CUB/AG proposal should not be adopted.

14. Section 730.550 – Network Outages and Notification.

Verizon presented compelling evidence and argument as to why Staff's proposed Section 730.550 must be amended. (Verizon Init. Br., pp. 18-19). Staff's opposition to this proposal is unavailing. (Staff Init. Br., p. 86). Staff offers no explanation why carriers with small exchanges must be subject to greater notification burdens than carriers with primarily large exchanges. While an outage affecting 20 lines may be "serious" (*Id.*), a large carrier who experiences the exact same problem on 20 lines at a large exchange will not be under the same regulatory burden. In short, Staff offers no persuasive basis to treat carriers with small exchanges on a disparate basis. Accordingly, the Commission should adopt Verizon's proposal to replace Staff's percentage of lines out requirement with a fixed line threshold that is applicable to all carriers.

[9] The only exceptions are the reporting and retention requirements in subsections (e) and (i). (See Verizon's Init. Br., p. 18).

III.
Conclusion

The record demonstrated that Part 730 requires only limited changes. The proposals of the City and CUB/AG, in particular, seek to impose dramatic changes to the rule that result in greater regulatory burdens and increased costs –costs ultimately borne by customers. The record, however, completely fails to support such suggestions. Accordingly, the Commission should adopt Staff's proposed rule, subject to the amendments set forth in Verizon's Initial Brief.

Dated: March 14, 2002

Respectfully submitted,

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CERTIFICATION

I, John Rooney, hereby certify that I served a copy of the Reply Brief of Verizon North Inc. and Verizon South Inc. upon the service list in Docket No. 00-0596 by email on March 14, 2002.

_____

John E. Rooney